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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DIEP and KHA DINH TRAN, Defendants and Appellants.	G037553 (Super. Ct. No. 03WF2374) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Law Office of William J. Kopeny & Associates and William J. Kopeny for Defendant and Appellant Christopher Diep.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant Kha Dinh Tran.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Following a 15-day trial, a jury found Christopher Diep and Kha Dinh Tran guilty of one count each of first degree murder (Pen. Code, § 187, subd. (a) [count 1]) and one count each of street terrorism (*id.*, § 186.22, subd. (a) [count 2]) in the murder of 14-year-old Eddie Fernandez. The jury found true the special circumstance allegations that each was a principal who vicariously discharged a firearm causing great bodily injury or death (*id.*, § 12022.53, subds. (d) & (e)(1)) and that each committed the murder for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)).[1]

The trial court sentenced Diep and Tran each to 25 years to life on the murder count, two years concurrent on the street terrorism count, and 25 years to life consecutive on the vicarious discharge of a firearm enchancement. The court stayed the sentence on the criminal street gang enhancement.

Eddie Fernandez was an innocent victim of a criminal street gang, which mistook him and his friends for members of a rival gang. Diep, Tran, and Andrew Khac Vu, all members of the Tiny Rascals Gang (TRG), chased Fernandez and his friends as they were heading to a friend's house in a taxicab and ambushed them. One of the three gunned down Fernandez and killed him. In *People v. Vu* (2006) 143 Cal.App.4th 1009, we affirmed the conviction of Vu, a member of TRG, for the first degree murder of Fernandez. We do not know for sure, and might never know, whether it was Diep, Tran,

[1] The jury was unable to reach a verdict on a special circumstance allegation under Penal Code section 190.2, subdivision (a)(22) (special circumstances for imposition of death penalty or life without parole). The trial court declared a mistrial on that special circumstance allegation and, on the prosecution's motion, struck it.

or Vu, who fired the gun and killed Fernandez. However, the evidence compellingly proved that Diep and Tran, if not the actual shooters, aided and abetted the commission of the crime leading to Fernandez's killing and are equally guilty with the shooter of first degree murder.

Diep and Tran filed separate briefs raising different contentions, and each have joined in the other's briefs. We reject each contention raised by Diep and Tran, or find any error to have been harmless, and therefore affirm.

FACTS

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

I.

The Murder

Diep and Tran were active members of TRG, a criminal street gang in Orange County. Between 1999 and 2002, TRG members committed and pleaded guilty or no contest to crimes of robbery, assault with a deadly weapon, and attempted robbery committed for the benefit of the gang. Asian Boys is another criminal street gang in Orange County. TRG and Asian Boys are rival street gangs.

In October 2000, members of the Asian Boys gang attacked three TRG members—Vu, Minot Ly, and Quan To. Vu and Ly were stabbed in the attack, and Ly died from his wound. Vi Thao (Vicky) Bui was Ly's girlfriend and became good friends with Vu after Ly's death.

As of June 2002, Diep had moved from Orange County to Texas, but often traveled to Orange County to visit friends. Diep was a good friend of Ken Ton, and often stayed at Ton's house in Stanton when visiting the area.

In the evening of June 7, 2002, Eddie Fernandez and three friends, including his best friend M.T.,[2] walked to the I.C.E. cybercafé on Brookhurst Street and Chapman Avenue in Garden Grove to play videogames. They were in junior high school at the time. At the I.C.E. cybercafé, they met a group of 10 or 12 other boys.

Ton and a group of friends, including Ron Le, Jack San, Anthony Nguyen, and Vilakone Visaychack, also were at the I.C.E. cybercafé during the evening of June 7, 2002. While Ton and his friends were playing pool, some young men, who appeared to be Asian Boys gang members, walked into the I.C.E. cybercafé and "maddogg[ed]" Ton (stared at him with a mean look). About 30 Asian Boys gang members stood outside the I.C.E. cybercafé and gestured at Ton to try and get him to come outside. Anthony Nguyen reported the matter to the proprietor of the I.C.E. cybercafé, and police officers arrived at about 11:10 p.m.

After being maddogged by the Asian Boys gang members, Ton used Le's cell phone and started making calls. Ton appeared angry. He called Bui, who was driving toward Tran's house, and asked to speak with Diep. Diep was not in the car, so Bui handed the phone to her friend Mark Aquino. She overheard Ton advising Aquino that Asian Boys were at the I.C.E. cybercafé.

Bui soon arrived at Tran's house, on the corner of Magnolia Street and McFadden Avenue in Westminster, where Tran, Diep, Vu, and others were drinking beer in the backyard. A white Toyota Camry was parked in an alley near Tran's backyard. Tran had stolen the car in San Diego earlier that day and had driven it to his house.

While at Tran's house, Bui received a call on her cell phone from Ton who, still using Le's cell phone, again asked to speak to Diep. Bui handed her cell phone to Diep, and heard him say, "the gun is at Ken's [Ton's] house." A few months earlier, Ton had shown Visaychack a revolver kept in a drawer in Ton's bedroom.

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[2] We use initials for minors rather than names to protect their identity from disclosure.

After using Bui's cell phone to make a call, Vu announced, "there's crabs at ICE" (TRG members sometimes refer to Asian Boys gang members as "crabs"). After speaking with Diep and Tran, Vu asked others at Tran's house to go with him to the I.C.E. cybercafé. Vu, Tran, and Diep left Tran's house: Vu in his black Toyota Corolla, and Tran in the stolen white Toyota Camry that had been parked in the alley.

Meanwhile, back at the I.C.E. cybercafé, Fernandez and his friends continued playing games late into the evening, until they ran out of money. They decided to go to their friend S.'s house, and called for a taxicab from a pay telephone outside the I.C.E. cybercafé. While waiting outside for the taxicab to arrive, Fernandez told M.T., "some Asian guy kept on driving around . . . staring at them." When the taxicab arrived, Fernandez, M.T., B.F., and B.M. got in, and it drove down Brookhurst Street, heading toward their friend S.'s house.

Also leaving the I.C.E. cybercafé at the same time were Ton, Le, Anthony Nguyen, and San. They were in Le's black Acura, with Ton driving. Nguyen and San had left their cars at the I.C.E. cybercafé and traveled with Ton to protect him if a fight broke out. As the black Acura drove off, Ton and the others noticed a group of boys, about 14 to 16 years old, standing at one side of the I.C.E. cybercafé. Ton, believing they were Asian Boys gang members, maddogged them.

Ton did not drive long before Anthony Nguyen realized he had left his driver's license at the I.C.E. cybercafé. Ton drove back to the I.C.E. cybercafé, where a few other boys had joined the group of boys standing outside. Ton saw them and told Nguyen they were Asian Boys gang members. After Nguyen saw some of the boys get into a taxicab, Ton made a call from Le's cell phone. Nguyen heard Ton say, "[t]hey're in a yellow cab." Ton, driving the black Acura, followed the taxicab down Brookhurst Street.

The taxicab traveled down Brookhurst Street and made a right turn onto Lampson Avenue. Ton, following, made a cell phone call to say, "the cab made a right

on Lampson." As the black Acura approached Magnolia Street, Ton received a cell phone call and was told by the caller to pull over and let the caller "go first." As Ton pulled the black Acura to the side of the street, a dark-colored Toyota Corolla and a light-colored Toyota Camry passed, running a red light at the intersection of Lampson and Magnolia. As the taxicab drove through the same intersection, M.T. looked back and saw a white car run the red light. M.T. said to Fernandez, "I think we [are] being followed." Fernandez replied, "oh, no. You're tripping out."

The taxicab turned left onto Adelle Street, and stopped because the boys did not have enough money to continue the short distance to S.'s house. The four boys got out of the taxicab. With the front passenger door open, Fernandez leaned into the front passenger side of the taxicab to pay the driver. M.T. was standing on the sidewalk, just behind Fernandez. At that moment, M.T. looked back. He saw a white car with its headlights on and a man holding a small towel or bandanna and walking quickly toward them. The man extended his arm and pointed the towel or bandanna toward the boys. M.T. heard a gunshot, realized the man was shooting at them, and ran in the direction of S.'s house.

Fernandez could not run away because he was trapped behind the open door of the taxicab. After hearing the gunshot, M.T. saw Fernandez fall onto the floor of the taxicab. The man continued walking toward Fernandez. As M.T. ran, he heard more gunshots fired in rapid succession. M.T. hid behind a car and heard a car "burn out" (leave quickly).

As Ton's group in the black Acura arrived at the shooting scene, Anthony Nguyen saw the taxicab, a black car, and a white car parked behind it to the side of the street. Nguyen heard gunshots. Ton did not stop; Nguyen and the other passengers ducked their heads and the car "just took off" toward Beach Boulevard. After driving a few minutes, Ton received a cell phone call, after which he told the others in the black Acura, "[w]e didn't hear anything, and we didn't see anything."

When M.T. thought it was safe to come out of hiding, he went straight to Fernandez, who was lying curbside and bleeding. M.T. heard Fernandez breathing, and talked to him, but he did not respond. A man appeared and helped M.T. roll Fernandez over and hold a towel to his bleeding stomach.

Fernandez bled to death. He had suffered five gunshot wounds, lacerating his liver, and perforating his diaphragm, bowel, spleen, inferior vena cava, and abdominal aorta. Three bullets were recovered from his body.

II.

Police Investigation

Around 12:50 a.m. on June 8, 2002, Garden Grove Police Officers Negron and Lawton and Investigator Reynolds were dispatched to the area of Adelle Street and Lampson Avenue. On arriving at the scene, Negron saw a white, four-door Toyota Camry parked on the grass against a fence, north of the curbline of Lampson. Its engine was running and the headlights were on, but nobody was inside. Negron looked southbound on Adelle and saw a yellow taxicab, Fernandez lying on the ground, and several people standing around.

Police officers investigating the crime scene found a brass bullet in the street and discovered a bullet hole in a wooden fence and a bullet hole in a tree trunk behind the fence. A bullet later was found in a chunk removed from the tree for examination. Three bullets were recovered from Fernandez's body during an autopsy.

On June 8, a woman saw a revolver lying in the middle of Beach Boulevard. A firearms expert determined the bullets removed from Fernandez's body, the bullet found in the street, and the bullet removed from the tree were all fired from that revolver. A small amount of DNA was collected from the revolver's grip and was determined to contain a mixture of DNA of four persons. The prosecution's DNA expert testified the DNA from the revolver was degraded, and tests were inconclusive as to whether Diep, Tran, or Vu was a major contributor to the DNA collected from the gun.

Tran had stolen the white Toyota Camry left at the crime scene on June 7 in San Diego and had driven it back to Orange County that day. DNA samples collected from the steering wheel were tested, and the prosecution's DNA expert concluded, "neither [the vehicle's owner] or Mr. Tran could be eliminated as contributors to that mixture of DNA."

Garden Grove Police Officer Peaslee located Vu's black Toyota Corolla parked in front of the home of Khoi Nguyen. A few days later, a police forensic expert found a pair of black fabric gloves in the car's glove box.

III.

Flight and Coverup

Around 2:00 a.m. on Sunday, June 9, Diep, Vu, and Aquino went to Bui's house and told her they needed a place to sleep. Vu told Bui: "If anyone asks, I was with you on Friday [June 7, 2002]." Later on June 9, Diep and Vu asked Bui to rent them a room at a motel. Bui rented them a room in her name at the Fire Station Motel. At the motel, Vu told Anselmo Mendoza, a friend of Bui's, "whatever you hear around the streets, just don't believe it," and to keep his mouth shut.

A few days later, while in custody, Vu called Bui and told her he had been arrested for a probation violation. He said: "[H]ey, Vi, remember we were out at Spiderman Friday night?" He continued: "[T]here's some guy from Bolsa [referring to Ton] . . . who is saying I'm involved in some murder. I don't know what he's talking about 'cause we were at Spiderman."

A few days after the murder, Bui traveled to San Diego with Tran. When interviewed by the police, Bui never mentioned this trip and claimed she barely knew Tran. At trial, Bui testified she did not bring up Tran's name in the police interview because she was afraid of him.

On November 23, 2002 at 2:55 a.m., California Highway Patrol Officer Robert Fonsbenner stopped a vehicle Tran was driving in the San Diego area. When

asked for identification, Tran gave Fonsbenner a California identification card with the name Binh Nguyen.

On December 31, 2002, Tran was arrested in the San Diego area after stealing two cars. In July 2003, Diep was arrested in Houston, Texas.

IV.

Cell Phone Records

Telex Pegnyemb, a radio frequency engineer for Sprint, testified about cell sites and towers and the transmission of signals. He reviewed cell phone site records for June 7 and 8, 2002 and was able to track the movement of cell phones as they were being used to make and receive calls. Garden Grove Police Detective Elaine Jordan gathered the records of cell phones used by Bui, Diep, Tran, Le, and Ton for June 7 and 8, 2002, and created a chart, received in evidence as exhibit 48, showing usage for Diep's cell phone on June 8. (Ton was using Le's cell phone, so the exhibit refers to "Ton" for calls made to or from Le's cell phone.)

Jordan determined that in the late night hours of June 7 and the early morning hours of June 8, Diep's and Le's cell phones registered at cell sites in the Garden Grove area.[3] Tran's cell phone registered at cell sites in the Westminster/Garden Grove area. Bui's cell phone registered at cell sites in Anaheim, then in Garden Grove and Westminster. The information gathered and organized by Jordan established this following chronology of calls made from Bui's, Diep's, Tran's, and Le's cell phones:

June 7, 2002. 10:30 and 10:37 p.m., Diep's phone called Tran's phone. 10:57 p.m., Bui's phone called Tran's phone. 10:58 p.m., Bui's phone called Le's phone. 11:01 p.m., Bui's phone called Diep's phone. 11:15 p.m., Bui's phone called Le's phone.

[3] Long Tran testified he purchased cell phone service with Sprint in his own name for his friend, Diep. For that reason, the cell phone records reflected Long Tran's personal information, but calls made and received on that phone are shown as being Diep's. We refer to this cell phone as "Diep's phone."

11:23, 11:36, and 11:49 p.m., Diep's phone called Le's phone. 11:32 p.m., Tran's phone called Le's phone. 11:50 p.m., Diep's phone called Tran's phone.

June 8, 2002. 12:03, 12:08, 12:35, 12:37, and 12:43 a.m., Tran's phone called Diep's phone. 12:04 and 12:21 a.m., Bui's phone called Diep's phone. 12:10, 12:22, 12:32, and 12:34 a.m. Diep's phone called Le's phone. 12:27, 12:30, and 12:32 a.m., Le's phone called Diep's phone. 12:35 a.m., Diep's phone called Tran's phone. 12:41 a.m., Le's phone called Diep's phone. 12:41, 12:42, and 12:45 a.m., Diep's phone called Le's phone. *(Fernandez was killed about 12:45 a.m.)* 12:45 a.m., Tran's phone called Diep's phone. 12:45 a.m., Diep's phone called Le's phone. 12:45 a.m., Tran's phone called Diep's phone. 12:50 a.m. (twice), 12:53 a.m., 1:14 a.m., and 1:16 a.m., Diep's phone called Le's phone.

According to Jordan, the cell phone records showed that from 12:08 to 12:45 a.m. on June 8, the cell site at 9501 Chapman Avenue, Garden Grove, registered more than 20 calls exchanged between Diep's and Tran's cell phones. The gun used to kill Fernandez was found at a point between the place where he was killed and the cell site where Diep's phone had called Le's phone at 12:50 a.m.

V.

Expert Testimony on Criminal Street Gangs

Garden Grove Police Officer and gang unit investigator Peter Vi testified as an expert on criminal street gangs. Vi had been a police officer for 17 years and a member of the gang enforcement unit for 12 years. He reviews all police reports involving gang-related activities in Garden Grove and all field interview cards involving gang members. His credentials as a criminal street gang expert are not in dispute.

Vi explained that a field interview card is a double-sided, two- by four-inch card with information about gangs obtained during an interview with a suspected gang member or associate. The card includes the date and time of the interview, the reason for the contact, and personal information about the person interviewed, including name,

address, place of employment, home phone number, pager number, type of car owned, and description of tattoos. Vi testified the person interviewed would be asked about gang affiliation, would be warned, "hey, your gang is a criminal street gang," and would be given a "gang determination notice"—sometimes referred to as a "STEP notification"—warning of the legal consequences of committing a crime while participating in a criminal street gang. The Garden Grove Police Department maintains the field interview cards as "intelligence files" and shares the information on the cards with other law enforcement agencies.

Vi testified about the culture and practices of Asian gangs. He explained that Asian gangs have gang colors and symbols and use hand signs. Some Asian gang members are tattooed with the gang's name or initial to show dedication to the gang and to intimidate others. Some Asian gangs use a bandanna in the gang's colors. Gang molls often collect photographs of gang members posing with other gang members and letters gang members have written.

Asian gangs, unlike Hispanic gangs, are not territorial, and tend to congregate at certain locations such as pool halls, restaurants, and nightclubs. Asian gangs are mobile, and will disperse from a meeting place if necessary to avoid the police.

Gangs form alliances and rivalries with other gangs. They use guns to attack rivals and to defend themselves from rival attacks. Vi explained a "gang gun" is a gun shared by the gang's members and passed between gang members for safekeeping.

Vi explained the importance of the concept of "respect" in gang culture. Staring down or maddogging is considered disrespectful, and killing is the ultimate form of disrespect. In response to an act of disrespect, a gang will seek "payback"—meaning revenge or retaliation—with at least equal force. A payback can occur after the disrespect, or weeks, months, or years later.

A "hit-up," Vi explained, is when gang members ask someone "where are you from?"—meaning with which gang do you associate. A response of a rival gang name could lead to a violent confrontation.

Vi testified gang members will provide other gang members "back-up" in a confrontation with a rival gang. A gang member might also provide "back-up" by assisting in planning and taking part in crimes by, for example, retrieving the gang gun, driving the getaway car, or not speaking with law enforcement after the crime is committed.

Vi testified about TRG in particular. TRG is an Asian gang. Formed in California, TRG has "subsets" in Orange County and Long Beach, and has spread throughout the country. Based on his experience and review of records, Vi opined that TRG is a criminal street gang.

Asian Boys is one of TRG's primary rivals. Vi testified he had seen reports of many violent confrontations between TRG and Asian Boys gang members. Vi testified the Asian Boys showed TRG the ultimate disrespect by killing Minot Ly in 2000, and TRG's failure to retaliate would be a sign of weakness, prompting rival gangs to attack TRG members. Vi testified the killing of Eddie Fernandez, though a case of misidentification, earned TRG respect in the gang world by showing TRG would respond to a perceived threat from a rival gang.

Vi was familiar with both Diep and Tran. Based on everything he knew about Diep and Tran, including field interview cards, photographs, tattoos, and associations, Vi opined that Diep and Tran were active participants in TRG as of June 8, 2002. Vi also was familiar with Vu and Ly. Based on everything he knew about Vu and Ly, Vi opined that Ly had been a TRG member and Vu was an active participant of TRG on June 8, 2002.

Given a hypothetical set of facts based on the facts of this case, Vi testified the killing in the hypothetical was committed in association with, and for the benefit of,

the hypothetical gang. He explained: "For the benefit of the gang, you have a gang member who was killed in 2000 by a rival gang, Asian Boys. . . . [I]t's the ultimate disrespect, Asian Boy killing a T.R.G. gang member. [¶] And some of the surviving victims from the killing are still alive after this case. They are aware of the situation and have an opportunity to gain this respect back. By gaining this respect back, they're going to use violence equal or greater than. So they're going to come back and deal with the rival gang Asian Boys, shooting them or killing them to save the retaliation or the revenge which was caused in 2000. [¶] So it definitely benefits the gang, glorifies the status as a violent gang. They live up to the reputation. . . . [¶] . . . [¶] Again, they get the retaliation because Asian Boys disrespected with the killing in 2000. And again, they disrespect another T.R.G. back in 2002 when they called this guy out when he wouldn't come out, so that's a disrespect. So instead he called for back-up, which is T.R.G. gang members showing up at the scene."

DISCUSSION

I.

Substantial Evidence Supported the Jury Verdict.

Diep argues substantial evidence did not support the jury's verdict convicting him of first degree murder and street terrorism. Tran joins in this and all of Diep's arguments.[4] We conclude the evidence of guilt was compelling.

A. *Standard of Review*

Because Diep and Tran challenge the sufficiency of the evidence to support their convictions, we examine "the whole record in the light most favorable to the

[4] Although Tran has joined in all of Diep's arguments, he does not argue how the evidence was insufficient to support the jury verdict against him or whether there was a factual basis for Vi's opinion that he was an active TRG participant. Nonetheless, we address whether the evidence supported the verdict against Tran and whether Vi's opinion that Tran was an active TRG participant had a sufficient factual basis.

judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) We view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact reasonably could deduce from the evidence. (*People v. Barnes*, *supra*, 42 Cal.3d 284, 303.) The jury, not the appellate court, must be convinced of guilt beyond a reasonable doubt; for us, "[t]he test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

The standard of review is the same when the prosecution relies on circumstantial evidence. (*People v. Thomas, supra,* 2 Cal.4th at p. 514.) Circumstantial evidence may be sufficient to prove the defendant's guilt beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

B. *Legal Standards: Aiding and Abetting Liability; Natural and Probable Consequences*

The jury found Diep and Tran guilty of first degree murder and of street terrorism. They were prosecuted on the theory they aided and abetted the crime of disturbing the peace, assault, or assault with a firearm, and the natural and probable consequence of any of those crimes was murder. The jury found true the allegations Diep and Tran each was a principal who vicariously discharged a firearm causing great bodily injury or death, and each committed the murder for the benefit of a criminal street gang.

Aider and abettor liability requires proof the aider and abettor acted with knowledge of the perpetrator's criminal purpose and with an intent or purpose of committing the offense, or of facilitating its commission. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) When guilt is based on the natural and probable consequences theory, the aider and abettor need not have the same intent or mental state as the actual

perpetrator. Rather, the mental state required of an aider and abettor under the natural and probable consequences theory is (1) knowledge of the confederate's unlawful purpose and (2) intent to commit, encourage, or facilitate the commission of the target crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267 (*Prettyman*).)

"Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

The aider and abettor's presence at the scene of the crime, companionship with the principal, and conduct before and after the offense are among the factors that may be considered in determining whether the defendant had the requisite knowledge and intent. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

C. *Evidence at Trial*

The evidence established beyond dispute that Diep, Tran, and the others had a motive for the killing. As explained fully in part III. of the Discussion section, the evidence firmly established Diep and Tran were active participants of TRG, a criminal street gang, on June 8, 2002. Indeed, Diep had Minot Ly's face and name tattooed on his arm, Tran had several TRG tattoos, and Bui testified Tran was an important figure in TRG. Vu and Minot Ly also were active TRG members. Ton and Bui were associated with TRG, and Le, Anthony Nguyen, and San were friendly toward TRG. Asian Boys and TRG were rival gangs.

In 2000, Asian Boys gang members attacked Vu and Ly, who was Vu's close friend and Bui's former boyfriend. Ly died, and Vu was wounded in the attack. Vi testified that in gang culture, killing is the ultimate form of disrespect, and a gang will seek revenge in response to disrespect. The killing of Minot Ly was the ultimate disrespect, for which TRG sought revenge. As Vi explained, Asian street gangs heed the adage, "revenge is a dish best served cold," and TRG members were willing to wait years after Ly's killing to take advantage of an opportunity for revenge against Asian Boys. That opportunity seemed to present itself on June 7 and 8, 2002.

The evidence at trial went far beyond gang association, motive, and opportunity. Diep and Tran were present at the crime scene, were companions of Vu, and were with Vu at Tran's house before the murder. Cell phone records tracked Diep's movement on the night of the murder from Tran's house, to Ton's house (where the gang gun was kept), to the murder site, to the place where the murder weapon was found, and back to Tran's house.

During the evening of June 7, 2002, several TRG associates and friends spotted Asian Boys gang members at the I.C.E. cybercafé. On June 7, around 9:00 p.m., San, Ton, Le, and Anthony Nguyen arrived at the I.C.E. cybercafé in Le's car, a black Acura Integra. As they were inside playing games, several Asian Boys gang members maddogged Ton. About 30 Asian Boys gang members stood outside and made hand gestures toward Ton, indicating they wanted him to come outside. As Vi explained, those acts were a form of disrespect toward TRG, and in gang culture could provoke payback or retaliation.

After Ton spotted Asian Boys gang members at the I.C.E. cybercafé, he used Le's cell phone, called Bui, and asked to speak with Diep. Why would Ton want to speak with Diep? To inform a TRG member that he had seen rival Asian Boys gang members. Bui, who was driving to Tran's house, handed the cell phone to Aquino

because Diep was not in her car. Bui testified she overheard Ton advising Aquino that Asian Boys were at the I.C.E. cybercafé.

The evidence unequivocally placed Diep and Tran at Tran's house on the night of June 7, 2002. Also at Tran's house was Vu, who had driven there in his black Toyota Corolla. Tran testified he had stolen a white Toyota Camry earlier that day in San Diego. The stolen white Toyota Camry was parked in the alley behind Tran's house.

Fernandez and his friends were at the I.C.E. cybercafé playing games on the night of June 7. When they ran out of money, they called for a taxicab and waited outside for it to arrive. M.T. testified he remembered Fernandez telling him "some Asian guy kept on driving around . . . staring at them."

At that time, Ton, Le, Anthony Nguyen, and Jack San were in Le's black Acura, circling the I.C.E. cybercafé parking lot. They were anticipating trouble: Nguyen and San had left their cars at the I.C.E. cybercafé so they could back up Ton if a fight broke out with Asian Boys gang members. Anthony Nguyen testified he was concerned for Ton's safety and wanted to back up Ton if something happened. As they left in the black Acura, they saw a group of boys, about 14 to16 years old, standing at one side of the I.C.E. cybercafé. Among the boys was Fernandez. Anthony Nguyen testified that Ton mistakenly believed the boys were Asian Boys gang members, and maddogged them.

When the taxicab arrived, Fernandez, M.T., B.F., and B.M. got in, and the taxicab drove off down Brookhurst Street, heading toward their friend S.'s house. Anthony Nguyen saw them get into a taxicab. Ton then made a call from Le's cell phone, and Anthony Nguyen testified he heard him say, "[t]hey're in a yellow cab." Ton, driving the black Acura, then followed the taxicab down Brookhurst Street.

Thus far, the evidence established the following. Ton had spotted rival Asian Boys gang members at the I.C.E. cybercafé late in evening of June 7, 2002. Ton was anticipating trouble. Ton tried to call Diep to notify him, and spoke with Aquino

instead. Eddie Fernandez and his friends were also at the I.C.E. cybercafé. While Fernandez and his friends waited outside for a taxicab, Ton, who was driving Le's black Acura, saw them and, mistaking them for Asian Boys gang members, maddogged them. When the taxicab left the I.C.E. cybercafé, Ton and the others followed in the black Acura, after Ton made a cell phone call to Diep to notify him that the mistaken Asian Boys gang members were "in a yellow cab." Why would Ton notify other TRG members he had seen Asian Boys gang members? So TRG members could exact payback for the killing of Minot Ly.

Bui testified she received a call on her cell phone from Ton who, still using Ron Le's cell phone, asked to speak to Diep. Bui handed her cell phone to Diep and heard him say, "the gun is at Ken's [Ton's] house." A few months earlier, Ton had shown Vilakone Visaychack a revolver kept in a drawer in Ton's bedroom. Diep stayed with Ton when visiting, and likely would know the gun—the gang gun—was at his house.

Andrew Vu borrowed Bui's cell phone to make a call. Anselmo Mendoza, who was at Tran's house the night of June 7, testified that at the end of the conversation, Vu announced that Asian Boys gang members were at the I.C.E. cybercafé. Mendoza testified that Vu spoke with both Diep and Tran, then asked others at Tran's house to go with him to the I.C.E. cybercafé. Mendoza told a police officer during a police interview that Vu, Tran, and Diep then left Tran's house. Bui testified she saw Vu, Tran, and Diep leave the party at the same time. The testimony established Vu left in his black Toyota Corolla, and Tran left in the stolen white Toyota Camry that had been parked in the alley.

At this point, three cars are in play: Le's black Acura driven by Ton, Vu's black Toyota Corolla, and Tran's white Toyota Camry. Tran was driving the white Toyota Camry and using his own cell phone. Vu, Diep, and Tran were TRG members. The occupants of the black Acura were associated or friendly with TRG, but were not gang members. A reasonable inference from the evidence was that the occupants of these

three cars were pursuing the yellow taxicab with the mistaken belief Asian Boys gang members were in it, and with the purpose of attacking them in revenge for Minot Ly's killing.

Cell phone records and testimony established the occupants of the three cars maintained continual communication with each other as they converged on the taxicab carrying Fernandez and his friends. Ton, in the black Acura, made a cell phone call and said, "the cab made a right on Lampson." As the black Acura approached Magnolia Street, Ton received a cell phone call and was told by the caller to pull over and let the caller "go first." Anthony Nguyen testified that as Ton pulled the black Acura to the side of the street, a black Toyota Corolla and a white Toyota Camry passed, running a red light at the intersection of Lampson and Magnolia. As the taxicab drove through the same intersection, M.T. looked back and saw a white car run the red light. A reasonable inference is that one car speeding through the red light was Vu's black Toyota Corolla, and the other was the white Toyota Camry driven by Tran.

Why would Ton pull over to let the other two cars go ahead? To let TRG members—Diep, Tran, and Vu carry out the revenge against Asian Boys.

Diep argues no evidence placed him at the crime scene and the verdict against him was based on "speculation." To the contrary, there was compelling evidence Diep was in Vu's black Toyota Corolla, went to Ton's house to retrieve the gang gun, and was at the crime scene:

Diep and Tran Left the Party at Tran's House at the Same Time. Diep and Tran left the party at Tran's house at the same time, after Vu had spoken with them, and in response to Vu's request to go to the I.C.E. cybercafé when it was learned Asian Boys gang members were there.

Cell Phone Records Showed Continual Communication Between Tran and Diep, but Not Between Tran or Diep and Vu. The cell phone records show that from 12:15 a.m. to 1:16 a.m., Diep made numerous calls to Ton (who was using Le's cell

phone), and Ton made calls to Diep, but neither Diep nor Tran made calls to Vu. Bui testified that Vu did not have his own cell phone at the time and would use others' cell phones. For Vu to maintain cell phone contact with others, he would have to have someone else, with a cell phone, in the car with him. The evidence pointed to Diep as that person. Diep's cell phone received no calls from anyone except Ton (using Le's cell phone) and Tran between 12:22 a.m. and 1:30 a.m. on June 8, 2002. Vu used Bui's cell phone at Tran's house on the night of June 7. At 12:21 a.m., Bui's cell phone called Diep's cell phone, but Bui had no further communication with Diep until at least 1:47 a.m.

Cell Phone Records Trace Diep to the Gun and the Murder Site. Cell phone and cell tower records established that between 12:03 a.m. and 1:14 a.m. on June 8, 2002, Diep traveled (1) first to Ton's house, where the gang gun was kept, (2) to the area of the I.C.E. cybercafé, (3) to the site of the murder, (4) through the area where the discarded gun was found, and (5) back to Tran's house.

Exhibit 47 vividly portrays the time and location of calls involving Diep's cell phone, and thereby tracks Diep's path in the early morning of June 8. Exhibit 47 is a map of the relevant area. Ton's house in Stanton (where the gun was kept) is marked with an icon of a green house. The I.C.E. cybercafé is marked with an icon of a coffee cup. The murder site is marked with an "X" in a red box. The place where the gun was found is marked with an icon of a gun in a black box. Tran's house is marked with an icon of a green house in a black box at the center bottom. Cell towers are marked with green dots. Orange arrows emanating from the green circles mark the orientation of signals from the towers. Numbers in white boxes at the pointed end of the arrows show the extent of signal from that tower (in other words, .686 miles means that tower can access a call from as far away as .686 miles). Charted on exhibit 47 are the times and approximate locations of calls made on Diep's cell phone in the early morning of June 8, based upon cell site records for Diep's cell phone number. The cell site records not only

show which cell tower received the call, but the direction (the call sector) from which the call was received or to which the call was sent.

Exhibit 47 shows the call made by Tran to Diep at 12:03 a.m. was routed by a cell tower north of Ton's house in Stanton and was directed in a south by southeast direction to a sector encompassing Ton's house, where Diep knew the gang gun was kept. From that point, exhibit 47 shows that Diep's cell phone moved in an easterly and southerly direction toward the I.C.E. cybercafé, and then in a southwesterly direction toward the murder site. At 12:45 a.m., about the time of the murder, Tran's cell phone called Diep's cell phone. Exhibit 47, reflecting the cell phone records, shows that call was routed through a cell tower to the south and east of the murder site, and was directed northerly to an area encompassing the murder site. In other words, Diep's cell phone was near the murder site at the time of the murder.

Exhibit 47 shows Diep's cell phone traveled south and slightly west and at 12:50 a.m. made a call routed by a cell tower just south of the spot where the gun was found. The call was directed north, placing Diep at the spot where the gun was found. Diep's cell phone then traveled south and east, and at 1:14 a.m. made a call routed through a cell tower to the north of Tran's house. That call was directed to the south and west, to a sector encompassing Tran's house.

Cell phone records thus showed that Diep's cell phone was near Ton's house, where the gun was kept, about 12:05 a.m.; was in the area of the murder between 12:08 a.m. and 12:45 a.m.; and was in the area where the gun was found about 12:50 a.m.

Testimony Placed the Black Toyota Corolla and the White Toyota Camry at the Crime Scene. Anthony Nguyen, who was in the black Acura with Ton, testified that, as they passed the crime scene, he saw a white car parked behind a black car, and a taxicab. A reasonable inference is the white car was the white Toyota Camry driven by Tran, and the black car was Vu's Toyota Corolla.

Diep Called Ton After the Murder and Told Him He Did Not Hear or See Anything. Anthony Nguyen testified that, after the black Acura driven by Ton passed the crime scene, at about Beach Boulevard, Ton (using Le's cell phone) received a call, after which he told the others in the black Acura, "[w]e didn't hear anything, and we didn't see anything." Cell phone records establish Diep called Ton (who was using Le's cell phone) at 12:45, 12:50, 12:53, 1:14, and 1:16 a.m. on June 8, 2002. Fernandez was killed about 12:45 a.m. A reasonable inference is Diep called Ton after the crime and told him he did not hear or see anything at the crime scene.

The Car Stolen by Tran Was Found at the Murder Scene. A white Toyota Camry had crashed against a fence and been abandoned at the crime scene. DNA samples were taken from the car steering wheel and from the car's owner and from Tran. A senior forensic scientist with the Orange County Sheriff's crime lab analyzed the DNA samples and testified that Tran "could not be eliminated as a second major contributor to that DNA mixture." Tran had stolen a white Toyota Camry on June 7 in San Diego and had driven it back to Orange County. A reasonable inference from that evidence is the white Toyota Camry abandoned at the crime scene was the car Tran had stolen on June 7.

Evidence of Flight. Evidence of flight immediately after the commission of a crime is relevant to show consciousness of guilt. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1054-1055.) Bui testified that Vu and Diep arrived together at her house on Sunday, June 9, asking for a place to sleep. In the afternoon of June 9, Vu and Diep asked Bui to rent a motel room for them. Bui rented them a motel room in her name. Police found a pair of black fabric gloves inside Diep's black Toyota Corolla. A few days after the murder, Tran traveled to San Diego with Bui.

The evidence thus established that, at least as of the time they left Tran's house, Diep and Tran knew of Vu and the other perpetrators' intent to disturb the peace or commit an assault against Asian Boys gang members, mistakenly believed to be in the taxicab leaving the I.C.E. cybercafé. Diep and Tran aided and facilitated the crime by

providing backup, retrieving the gang gun from Ton's house, and maintaining telephone contact with the other participants. The evidence placed Diep and Tran squarely at the scene of the crime. A natural and probable consequence of assaulting a rival gang member with a gun is murder. As Anthony Nguyen testified, when TRG and Asian Boys get together, "[a] murder happens."

II.

The Challenged Portions of Jordan's Testimony Either Were Not Improper Assessments of Veracity or Were Harmless.

Diep argues the trial court erred by permitting the prosecution to use Detective Jordan as a "'lie detector'" by testifying to her opinion of the veracity of several witnesses. We conclude the challenged testimony was admissible or its admission was harmless error.

Detective Jordan of the Garden Grove Police Department was the lead detective in the investigation of Fernandez's murder. During the course of her investigation, Jordan interviewed Bui on June 13, 2002. At trial, the prosecutor asked Jordan, "[f]air to say [Bui] lied to you throughout that interview?" Jordan answered, "[o]h, yes." Defense counsel did not object or move to strike the testimony.

On cross-examination, Diep's attorney asked Jordan questions about her interview of Visaychack shortly after he testified at Vu's trial in August 2003. Jordan testified that, when she asked Visaychack about cell phone records showing he had received calls during the night of June 7, he claimed he could not recall receiving any cell phone calls that night. Jordan testified that Visaychack also told her he recalled hearing a voice on the other end of the line, but he did not recognize the voice. In the interview, Visaychack acknowledged he knew Andrew Vu and could recognize his voice. At trial, Diep's counsel asked Jordan, "did you ask [Visaychack] specifically, 'was that Christopher Diep on the other end of the line?'" She answered, "[y]es," but added that Visaychack said, "he didn't think that it was."

On redirect examination, the following colloquy occurred:

"Q [the prosecutor] And is it fair to say that these people were not – I'm speaking generally as a whole – were very reluctant to provide you with information that they thought would hurt their friends?

"A [Jordan] Definitely.

"Q Okay. I mean was that a roadblock throughout this entire investigation?

"A Yes, it was.

"Q And even determining who the heck was at that party at Kha Tran's house took a great deal of work on your part. Fair to say?

"A Yes."

Defense counsel did not object to any of those questions or move to strike any of Jordan's responses. Instead, on recross-examination, Diep's attorney asked Jordan: "When you interviewed Mr. Visaychack, was he one of these people that you had a sense of he was being reluctant in terms of providing you information?" Jordan answered, "[y]es." Jordan explained she reached that belief based on: "Just how he answered. Just short answers. Didn't seem like he was giving all the truth. Just like everyone else." Defense counsel did not move to strike that response.

Generally speaking, neither an expert nor percipient witness may give an opinion on whether a witness is telling the truth or whether the defendant is guilty. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82; *People v. Melton* (1988) 44 Cal.3d 713, 744.) In *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at page 82, a psychologist testified she believed a child abuse victim told the truth during an interview. The California Supreme Court concluded an objection should have been sustained to the testimony. (*Ibid.*)

In *People v. Melton, supra*, 44 Cal.3d at page 742, a defense investigator testified at trial about conversations he had with a witness who had told him a man named

Charles rather than the defendant committed the charged murder. On cross-examination, the prosecutor was permitted to question the investigator on his failure to seek assistance from law enforcement in finding Charles. (*Id.* at pp. 743-744.) The defendant argued those questions were impermissible because they disclosed the investigator's inadmissible opinion that the witness was not credible. (*Id.* at p. 744.) The California Supreme Court agreed: "The instant record does not establish that [the investigator] is an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations. He knew nothing of [the witness]'s reputation for veracity. He was able to describe his interviews with [the witness] in detail, leaving the factfinder free to decide [the witness]'s credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to [the investigator] had the essential 'ring of truth.' The trial court thus erred insofar as it admitted [the investigator]'s testimony to indicate his assessment of [the witness]'s credibility." (*Id.* at pp. 744-745.) The court deemed the error harmless because the prosecutor did not use the investigator's testimony and there was strong evidence of guilt. (*Id.* at p. 745.)

Diep relies on *People v. Sergill* (1982) 138 Cal.App.3d 34 as support for the proposition Jordan's testimony, quoted previously, was inadmissible. In that case, the defendant was convicted of oral copulation with a child. (*Id.* at p. 37.) At trial, defense counsel called two police officers to testify about discrepancies between what the child told them and the child's trial testimony. (*Id.* at p. 38.) During cross-examination, one officer was permitted to testify he believed the child was telling the truth and to explain the basis for that belief. (*Ibid.*) The second officer also was permitted to testify that the child had told the truth and that the officer had "'arrive[d] at the truth'" during the questioning. (*Ibid.*) The Court of Appeal reversed the conviction, concluding the officers' opinion on the child's veracity was inadmissible either as a lay or expert opinion. (*Id.* at pp. 39-40.)

Jordan's testimony that Bui lied throughout the interview was a comment on Bui's veracity, but was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Melton, supra,* 44 Cal.3d at p. 745 [error in admitting opinion of witness veracity judged under "reasonable probability" standard of *People v. Watson*].) Bui testified she lied to Jordan throughout the interview. On direct examination, Bui testified as follows:

"Q [the prosecutor] And did you have an interview with this investigator, investigator Jordan?

"A [Bui] Yes, I did.

"Q Okay. And at that time she asked you what you were doing on June 7th, 2002. Correct?

"A Yes.

"Q And is it fair to say that you completely lied to her?

"A Yes."

A few moments later, the prosecutor asked Bui: "[Y]ou probably lied to her for like [*sic*] a good half an hour. Is that fair to say?" Bui replied: "Yes."

Jordan's testimony that Bui lied had no reasonable probability of affecting the jury verdict because Bui had conceded she lied throughout the interview. Any error in permitting Jordan to testify that Bui lied was therefore harmless.

Jordan's testimony that Visaychack and others were reluctant to provide information did not directly or inferentially constitute an assessment of veracity. Jordan was testifying as a percipient witness to the conduct of her investigation and the manner in which witnesses offered information. Jordan was not opining on the truth or falsity of any statements made to her.

Only when defense counsel asked Jordan for the basis for her belief that Visaychack was reluctant to provide information did she testify that he "[d]idn't seem like he was giving all the truth. Just like everyone else." Jordan's response was harmless

under *People v. Watson, supra,* 46 Cal.2d at page 836 to the extent that it constituted a comment on the witnesses' truthfulness. Jordan spoke with Visaychack about his cell phone records showing that he had received a cell phone call from a cell phone with an 832 area code just past midnight on June 8, 2002. Visaychack told Jordan he knew Diep and could recognize his voice, but did not think Diep was the caller. Diep was using a cell phone with an 832 area code, and there was no evidence anyone else used Diep's cell phone that night. Since the jury likely would not believe Visaychack in light of the cell phone records, and the evidence established Diep did call Visaychack, there was no reasonable probability that Jordan's statement that Visaychack was not "giving all the truth" influenced the jury's verdict.

Diep also contends his trial counsel was ineffective for not objecting to or moving to strike the challenged portions of Jordan's testimony. To prevail on a claim of ineffective assistance of counsel, the defendant must prove: (1) his or her attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards, and (2) his or her attorney's deficient representation subjected him or her to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.) The challenged portions of Jordan's testimony were either admissible or harmless; therefore, Diep cannot show ineffective assistance of counsel.

III.

Vi's Opinion That Diep and Tran Were Active Participants of TRG Had a Sufficient Factual Foundation.

At trial, the prosecution expert on criminal street gangs, Peter Vi, testified that Diep and Tran were "active participant[s]" of TRG on June 8, 2002. Diep argues that opinion lacked a sufficient factual basis and was therefore inadmissible. Without Vi's opinion testimony, Diep argues, his conviction on both counts 1 and 2 must be reversed.

Expert testimony may be based on material that is not admitted into evidence so long as it is material of a type that is reasonably relied on by experts in forming opinions in a particular field. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Ibid.*)

Vi's opinion testimony had a sufficient factual basis. Vi had been a police officer for 17 years and a member of the gang enforcement unit for 12 years. He reviews all police reports involving gang-related activities in Garden Grove and all field interview cards involving gang members. He speaks with gang members in the field, and, from 1993 to the time of trial, Vi had about 465 hours in gang training.

Vi's opinion that Diep was an active participant of TRG was based on the following:

1. Vi first became aware of Diep following an incident in 1999, when Diep and a group of friends, including Minot Ly, were shot at by a group of Asian Boys gang members.

2. In February 2002, Vi served Diep with a STEP notification. Diep was in a car with known TRG gang members, including Tran.

3. A sheriff's report showed that in April 2002, an Orange County Sheriff's deputy conducted a vehicle stop of a car in which Diep was in a car with at least one known TRG member.

4. Vi had spoken with TRG members about Diep's status in the gang.

5. Diep had a tattoo on his left upper arm of the face of Minot Ly with the name "Minot" tattooed underneath. Vi testified that all the TRG gang members with whom he had contact after Minot Ly's murder had a tattoo memorializing Ly's death. "Mr. Chris Diep went here with the extreme with the face [of Minot Ly]," Vi explained.

6. Diep had "Orange County" tattooed on his arms. Vi testified it was typical for gang members to have tattoos of the name of their counties or cities.

7. Vi determined during his investigation that Diep had the gang moniker "Clumsy."

8. Photographs showed Diep wearing a gray bandanna and posing with other TRG members. Vi explained Asian gang members often wear bandannas in the gang's colors and gray is TRG's color. The others in the photographs are wearing gray bandannas or gray caps. In these photographs, Diep and other TRG members used their hands to form TRG gang signs.

9. Photographs taken at Minot Ly's funeral in 2000 depicted Diep making TRG hand signs with Andrew Vu and other known TRG members.

Vi's opinion that Tran was an active participant of TRG was based on the following:

1. Vi had read police reports involving Tran's police contacts and arrests and found that Tran had been given a STEP notification on three occasions. When a Westminster police officer stopped Tran on February 19, 2000, he was with Minot Ly. Tran was with Diep and another known TRG member when stopped on February 12, 2000. Tran was with Andrew Vu, a known TRG member, when stopped on June 8, 2001.

2. A Westminster police report from April 7, 2002 noted Tran was in the company of a known TRG member.

3. In November 2002, Tran was stopped by a California Highway Patrol officer in San Diego. Tran gave the officer a false identification with another person's name on it. The name on the false identification was of a person having "ties with T.R.G."

4. Tran had the letters "TR" tattooed just above his armpits, and "TRG" tattooed on his left hand. On his legs, Tran had small tattoos of the letters "t," "r," and "g." Tran also had a tattoo of a star and the letter "O." Vi testified the star indicated

Tran had spent time in jail and was bragging about it. The letter "O" possibly represented "Outcast," a "party crew" that included Minot Ly, Diep, and Khoi Nguyen, and which had merged with TRG.

From those facts, an expert could reasonably conclude that Diep and Tran were active participants of TRG on June 8, 2002. In addition, Bui testified that Tran was an "[o]riginal gangster" in TRG—meaning "[s]omeone that the youngsters would look up to."

Diep argues Vi's testimony was similar to testimony held insufficient by a panel of this court in *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*). In that case, a juvenile petition alleged the minor committed three counts of vandalism for the benefit of, at the direction of, or in association with a street gang called Varrio Viejo. (*Id.* at p. 609.) A sheriff's deputy, testifying as a gang expert, testified generally about the benefits a street gang might derive from graffiti and opined Varrio Viejo was an active street gang at the time of the minor's arrest. (*Id.* at p. 611.) The deputy's testimony about the gang's primary activities consisted in full of the following: "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Ibid.*)

Vi's testimony was not in the least similar to that of the sheriff's deputy in *Alexander L.* As a panel of this court explained in *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 (*Martinez*), the gang expert in *Alexander L.* "never specifically testified about the primary activities of the gang," but merely stated, "'he "kn[e]w" that the gang had been involved in certain crimes,'" and "'did not directly testify that criminal activities constituted [the gang's] primary activities.'" Contrasting *Alexander L.*, the court in *Martinez* rejected the defendant's contention the testimony of the gang expert lacked foundation, stating: "Here, on the other hand, [the gang expert] had both training and experience as a gang expert. He specifically testified as to [the gang]'s primary

activity. His eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony." (*Martinez, supra,* 158 Cal.App.4th at p. 1330.)

In this case, like *Martinez* and unlike *Alexander L.*, Vi had substantial training and experience as a gang expert, and provided a substantial factual basis for his opinions that Diep and Tran were active participants of TRG. Diep contends the facts supporting Vi's conclusion were only that he knew and associated with TRG members, and "[i]t is not a crime to grow up in a neighborhood where gangs are present, or to be friends in school with other teenagers who are gang members." Evidence of association with gang members is relevant to show gang membership (see *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1500); nevertheless, the evidence of gang membership in this case goes far beyond association with gang members. Diep had the gang moniker "Clumsy," and photographs showed Diep's gang-related tattoos and Diep flashing gang hand signs, with other gang members, while wearing a bandanna in the gang color. This was compelling evidence of Diep's active participation in TRG.

IV.

The Trial Court Did Not Err by Giving the Special Jury Instruction on Premeditation and Deliberation.

The trial court gave a special jury instruction, drafted by the prosecution, stating: "If you find the defendant guilty of murder as an aider and abettor or as a co-conspirator, as I have defined it to you, in order for the premeditation and deliberation allegations to be true, it is not required that the defendant personally premeditate and deliberate the murder as long as the actual perpetrator of the murder acted with premeditation and deliberation." Tran argues this instruction is erroneous because an

aider and abettor must have the same specific intent or mental state of the perpetrator to be found guilty of aiding and abetting a crime.[5]

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*Prettyman, supra,* 14 Cal.4th 248, 259; see also Pen. Code, § 31.) Thus, "a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*).) A defendant can be liable as an aider and abettor in either of two ways: "First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.]" (*Ibid.*)

When the offense charged is a specific intent crime, an aider and abettor must share the specific intent of the perpetrator. "What this means here, when the charged offense and the intended offense—murder . . .—are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator." (*McCoy, supra,* 25 Cal.4th at p. 1118.) "Thus, to be guilty of . . . murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of . . . murder as an aider and abettor must intend to kill." (*People v. Lee* (2003) 31 Cal.4th 613, 624.)

[5] While we will assume appropriate objections were made or were unnecessary, we note the only objections made to the instruction were (1) Tran's attorney stated, "I'll just submit it, Your Honor"; and (2) Diep's attorney stated, "[l]odge an objection and submit it without any argument."

When guilt is based on the natural and probable consequences theory, the aider and abettor need not have the same intent or mental state as the actual perpetrator. Rather, the mental state required of an aider and abettor under the natural and probable consequences theory is (1) knowledge of the confederate's unlawful purpose and (2) intent to commit, encourage, or facilitate the commission of the target crime. (*Prettyman, supra,* 14 Cal.4th at p. 267.) "Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*McCoy, supra,* 25 Cal.4th at p. 1117.)

We determine the correctness of jury instructions from a consideration of the instructions as a whole, not only from a consideration of a particular instruction. (*People v. Bolin* (1998) 18 Cal.4th 297, 328.) An error in one instruction may be cured by the instructions as a whole. (*Ibid.*)

The special instruction written by the prosecution was a correct statement of the law for aider and abettor liability under the natural and probable consequences theory when considered with other instructions. The jury was instructed Diep and Tran could be found guilty only as (1) perpetrators (i.e., Diep or Tran shot Fernandez), (2) aiders and abettors under a natural and probable consequences theory, or (3) coconspirators. The instructions did not offer the jury the option of finding Diep and Tran guilty of aiding and abetting the crime of murder or of voluntary manslaughter. The court instructed the jury with CALCRIM No. 401 (aiding and abetting: intended crimes) and CALCRIM No. 403, as modified (natural and probable consequences). The court also read the general instructions on murder (CALCRIM No. 520), degrees of murder (CALCRIM No. 521), and voluntary manslaughter (CALCRIM No. 570). The jury was not instructed specifically on aiding and abetting the crime of murder. The CALCRIM No. 401 instruction read to the jury was the general aiding and abetting instruction unmodified and did not identify murder—or any particular crime. The modified

CALCRIM No. 403 stated, "[t]he People are alleging that the defendant originally intended to aid and abet *either the crime of disturbing the peace, assault, or assault with a firearm*." (Italics added.)

The instructions gave the jury the option of finding Diep and Tran guilty as aiders and abettors only under the natural and probable consequences theory with the target crime being disturbing the peace, assault, or assault with a firearm. Accordingly, when the instructions are viewed as a whole, the special instruction on deliberation and premeditation was not erroneous.

V.

The Jury Instructions and Verdict Forms Required the Jury to Determine the Degree of Murder if the Jury Found Diep and Tran Guilty of Murder.

Tran argues the trial court erred because the instructions on aiding and abetting and conspirator liability did not instruct the jury to determine whether the murder that was the natural and probable consequence of the target crime was of the first degree or of the second degree. Although the instructions on aiding and abetting and conspirator liability did not mention the degrees of murder, another instruction and the verdict forms required the jury to determine the degree of murder.

We determine the correctness of jury instructions from a consideration of the instructions as a whole, not only from a consideration of a particular instruction. (*People v. Bolin, supra,* 18 Cal.4th 297, 328.) Here, the trial court instructed the jury with CALCRIM No. 521, stating, in part: "If you decide that a defendant has committed murder, you must decide whether it is murder of the first or second degree." CALCRIM No. 521 then defines first degree murder and states, "[a]ll other murders are of the second degree." The jury was given separate verdict forms for first degree murder and second degree murder. The jury returned guilty verdicts for first degree murder, and the foreperson signed the verdict forms specifically for first degree murder.

The instructions and verdict forms thus required the jury to determine the degree of murder if the jury found Diep and Tran were guilty of murder. The instructions explained the difference between first and second degree murder. The instructions were not erroneous.

VI.

The Trial Court Was Not Required to Instruct the Jury Sua Sponte on the Lesser Included Offense of Involuntary Manslaughter.

Tran argues the trial court erred by not instructing the jury sua sponte on involuntary manslaughter as a lesser included offense of murder.

"Generally, involuntary manslaughter is a lesser offense included within the offense of murder." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) "Due process requires that the jury be instructed on a lesser included offense *only* when the evidence warrants such an instruction." (*Ibid.*)

In this case, the evidence at trial did not support giving an involuntary manslaughter instruction. The nature of the killing, the eyewitness account, and the autopsy of Fernandez lead only to the conclusion the killing was intentional, either because Diep or Tran shot Fernandez with the intent to kill, or because Diep and Tran aided and abetted an intentional assault, the natural and probable consequence of which was murder.

Moreover, the jury in this case rejected voluntary manslaughter, on which it was instructed, and found Diep and Tran guilty of murder. "[T]he fact that the jury rejected manslaughter and found defendant[s] guilty of the first degree murder of [Fernandez] precludes any possible error in the refusal to instruct on involuntary manslaughter." (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1145; see also *Prettyman, supra,* 14 Cal.4th at p. 276.)

VII.

The Trial Court Correctly Instructed the Jury on the Discharge of Firearm Enchancement.

The jury found true the special circumstance allegation under Penal Code section 12022.53, subdivisions (d) and (e)(1) for vicariously discharging a firearm as an aider and abettor in the commission of a crime for the benefit, at the direction of, or in association with a criminal street gang, and causing great bodily injury or death. Tran argues the trial court's instruction on that enhancement was erroneous because it did not instruct the jury to find he was a principal in the offense of murder.

The trial court gave this modified version of CALCRIM No. 1402 as the instruction on the discharge of firearm enhancement: "If you find the defendants guilty of the crime charged in count 1, murder, and you find that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang, with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether the People have proved the additional allegation that one of the principals personally and intentionally discharged the firearm during that crime and caused death. To prove this allegation, the People must prove that, one, someone who was a principal in the crime personally discharged a firearm during the commission of the crime; [¶] two, that person intended to discharge the firearm, and; [¶] three, that person's act caused the death of another person. [¶] A person is a principal in a crime if he or she directly commits the crime or if he or she aids and abets someone else who commits the crime."

According to Tran, that instruction is erroneous because it required the jury to find only the person who discharged the firearm was a principal in the crime. He relies on *People v. Garcia* (2002) 28 Cal.4th 1166, 1174, in which the court stated: "We conclude that in order to find an aider and abettor—who is not the shooter—liable under [Penal Code] section 12022.53, subdivision (d), the prosecution must plead and prove

that (1) a principal committed an offense enumerated in section 12022.53, subdivision (a), section 246, or section 12034, subdivision (c) or (d); (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; *(3) the aider and abettor was a principal in the offense*; and (4) the offense was committed 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' ([Pen. Code] §§ 186.22, subd. (b)(1) & (4), 12022.53, subd. (e)(1).)" (Italics added.)

The instruction given the jury in this case (CALCRIM No. 1402) was correct. That instruction included elements 1, 2, and 4 from *People v. Garcia.* While the third element was not verbatim included in the discharge of firearm instruction, the instruction covered that element by telling the jury it could consider the enhancement only "[i]f you find the defendants guilty of the crime charged in count 1, murder, and you find that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang, with the intent to promote, further, or assist in any criminal conduct by gang members." In that way, the instruction required the jury to find Diep and Tran guilty of murder and find they committed the murder at the direction of, or in association with a criminal street gang, with the intent to promote, further, or assist in any criminal conduct by gang members, *before* it could consider the discharge of firearm enhancement.

The jury found Diep and Tran guilty of first degree murder under count 1. Of necessity, the jury found them guilty as principals. The jury was instructed on three possible theories of guilt: (1) Diep or Tran shot Fernandez; (2) Diep and Tran aided and abetted the commission of a lesser crime than murder, the natural and probable consequence of which was murder; and (3) conspiracy. Principals in a crime include "[a]ll persons concerned in the commission of a crime, whether it be felony or

misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (Pen. Code, § 31; see also *Prettyman, supra,* 14 Cal.4th at pp. 259-260.) "Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator." (*People v. Avila* (2006) 38 Cal.4th 491, 564.)

Thus, under any theory the prosecution advanced, Diep and Tran would be principals in the charged offense as a matter of law and subject to the discharge of firearm enhancement under Penal Code section 12022.53, subdivisions (d) and (e) if the jury found them guilty of murder. The trial court did not err by giving CALCRIM No. 1402.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.